STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

JUSTIN TIMOTHY COMER, **No. 152713**
Defendant-Appellant.

L.C. No. 08-9312-01
Court of Appeals No. 318854

BRIEF AMICUS CURIAE BY THE WAYNE COUNTY PROSECUTOR'S OFFICE PURSUANT TO THE COURT'S ORDER OF MAY 7, 2016

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I.

Should defendant's conviction be affirmed either because he is not in fact subject to lifetime electronic monitoring, or because if he is subject to lifetime electronic monitoring, the trial judge had authority to correct the invalid sentence, and defendant declined the offer to withdraw his plea given the addition of this term to the sentence?

Defendant answers: NO

Amicus answers: YES

Statement of Facts

As set out in the opinion of the Court of Appeals, defendant pled guilty to CSC 1 and was sentenced to 51 months to 18 years. Though there was a box on the judgment of sentence for lifetime electronic monitoring, the trial judge did not check it, nor, apparently, did he impose this condition at the sentencing proceeding. A resentencing was ordered, and the minimum was lowered to 42 months, but again the lifetime electronic monitoring box was not checked nor, apparently, was that term of the sentence imposed at sentencing. Some 7 months later the Michigan Department of Corrections informed the trial judge that under *People v. Brantley*, 296 Mich. App. 546 (2012) lifetime electronic monitoring should have been a part of the sentence. Defense counsel objected. The prosecutor argued that the trial judge could amend the sentence to include the term while offering the defendant the opportunity to withdraw the plea because of the added term to the sentence. The successor to the trial judge found the plea defective, with defense counsel arguing that what had occurred was a substantive error that could only be corrected by a timely motion by the

prosecution, which had not occurred. The trial judge held that the plea was defective in not informing the defendant of a mandatory term of the sentence, and offered the defendant the opportunity to withdraw the plea, as lifetime electronic monitoring would be added to the sentence. Defendant declined to withdraw the plea. The Court of Appeals affirmed:

> In *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997), this Court held that "a motion for resentencing is not a condition precedent for a trial court to correct an invalid sentence under MCR 6.429(A)," and that the court rule "does not set time limits with respect to a trial court's authority to correct an invalid sentence." Further, Harris broadly declares, "There being no time restrictions specified in MCR 6.429(A), we decline to construe this court rule as containing a jurisdictional time limitation. Therefore, there was no impediment to the time of the trial court's decision . . . that would preclude it from ordering a resentencing pursuant to MCR 6.429(A)." Id. We are bound by Harris. MCR 7.215(C). Accordingly, the trial court was empowered to correct defendant's invalid sentence without time limitation.[1]

This Court has ordered argument on defendant's application for leave, and has invited the Wayne County Prosecutor's Office to file a brief as amicus curiae in the matter.[2]

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[1] *People v. Comer*, 312 Mich. App. 538 (2015).

[2] *People v. Roark*, No. 152562 (5-24-2016) ("The Wayne County Prosecutor is invited to file a brief amicus curiae in *People v Comer* (Docket No. 152713)").

Argument

I.

Defendant's conviction and sentence should be affirmed either because he is not in fact subject to lifetime electronic monitoring, or because if he is subject to lifetime electronic monitoring, the trial judge had authority to correct the invalid sentence, and defendant declined the offer to withdraw his plea given the addition of this term to the sentence.

Introduction

This Court's order directed the parties to file supplemental briefs addressing the following issues:

- whether the defendant's original sentence for first-degree criminal sexual conduct was rendered invalid because it did not include lifetime electronic monitoring, pursuant to MCL 750.520b(2)(d), i.e., whether MCL 750.520n requires that the defendant, who pled guilty to MCL 750.520b(1)(c), be sentenced to lifetime electronic monitoring, compare *People v. Brantley*, 296 Mich.App. 546, 823 N.W.2d 290 (2012) with *People v. King*, 297 Mich.App. 465, 824 N.W.2d 258 (2012); and;

- if so, whether the trial court was authorized to amend the defendant's judgment of sentence on the court's own initiative twenty months after the original sentencing, in the absence of a motion filed by any party. See MCR 6.429; MCR 6.435.

The difference of opinion between the *Brantley*[3] and *King*[4] majority opinions concerns whether the modifying phrase "by an individual 17 years old or older against an individual less than 13 years of age"in MCL 750.520n pertains only to convictions under 520c (CSC 2) or applies also to convictions under 520b (CSC 1). *Brantley* is the controlling opinion, holding that the limiting trailing modifier "by an individual 17 years old or older against an individual less than 13 years of age" applies only

[3] *People v. Brantley*, 296 Mich.App 546 (2012).

[4] *People v. King*, 297 Mich.App 465 (2012).

to convictions under 520c, over a vigorous dissent, *King* agreeing with the dissent, but the Court of Appeals declining to convene a conflict-resolution panel. This Court denied leave to appeal in both.

The defendant in this case pled guilty to CSC 1 where the victim was not under the age of 13, and so the second issue specified in this Court's order becomes moot upon a negative answer to this Court's first question, so that defendant's sentence was valid as imposed; that is, *without* the term requiring lifetime electronic monitoring on release from prison. Amicus thus begins with this potentially dispositive issue of statutory construction.

A. Construction of MCL 750.520n: Goal, Text, Context, Canons of Construction, and Legislative History

1. The goal of statutory construction

Michigan's statement of the task of the judiciary in statutory construction is orthodox:

- "Our primary aim is to effect the intent of the Legislature."[5]
- "We first examine the language of the statute and if it is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written."[6] In this examination, common words must be understood to have their everyday, plain meaning, and technical words, including terms of "legal art," are to be given their understood technical meaning.[7]

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[5] *People v. Likine*, 492 Mich. 367, 387 (2012).

[6] *Martin v. Beldean*, 469 Mich. 541, 546 (2004).

[7] MCL 8.3a provides that "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"; see also MCL 750.2 regarding construction of penal statute: "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

- "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent" and look to such aids as legislative history.[8]

When a court undertakes to "effect the intent of the legislature" what is it the court is attempting to discover? Judge Easterbrook has written that "intent is empty."[9] By this he means not that the legislature is not the lawgiver, with the role of the court to discover what law it is the legislature has enacted, but that there is no collective *subjective* legislative intent: "Peer inside the heads of legislators and you find a hodgepodge . . . . Intent is elusive for a natural person, fictive for a collective body."[10] When a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which naturally leads one first to the principal expression of intent—the text of the statute. The "law" is what the "objective indication of the words" of the statute mean.[11] Included in an "objective indication of the words" is the *context* in which they are used within the statutory scheme. As this Court has several times said, it is "well established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are

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[8] See e.g. *Wickens v. Oakwood Healthcare Sys.,* 465 Mich. 53, 60 (2001); *People v. Phillips,* 469 Mich. 390 (2003); *Gilbert v. Second Injury Fund,* 463 Mich. 866 (2000); *People v. Davis,* 468 Mich. 77 (2003); *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.,* 465 Mich. 872 (2001). This court has criticized the use of legislative history in the construction of statutes that are not ambiguous. See e.g. *People v. Guerra*, 469 Mich 966 (2003).

[9] Frank Easterbrook, "Text History, and Structure in Statutory Interpretation," 17 Harv Jrnl L & Pub Policy 62, 68 (1994).

[10] Id.

[11] Antonin Scalia, *A Matter of Interpretation* (Princeton University Press: 1997), at 29.

to be read as a whole,"[12] for a court construing a statute must consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'"[13]

Regrettably, the use by the legislature of a modifying word or phrase trailing after a series of two or more nouns or noun phrases often causes ambiguity in construction of statutes and instructions.[14] In these situations, examination of the plain text does not resolve the question of meaning. Resort to canons of construction, and especially to context, becomes critical. This is the case with the unfortunately drafted MCL 750.520n.

2. The statutory text: a case of syntactic ambiguity[15]

We accept only cats and dogs weighing less than 10 pounds.[16]

MCL 750.520n(1) provides that "A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the Corrections Code of 1953, 1953 PA 232, MCL 791.285." On its face, paragraph (1) is ambiguous: does the trailing modifying phrase "committed by an individual 17 years old or older against an

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[12] *Speicher v. Columbia Twp. Bd. of Trustees*, 497 Mich. 125, 137-138 (2014). See also *Robinson v. City of Lansing*, 486 Mich. 1, 15, 782 N.W.2d 171 (2010).

[13] *Speicher v. Columbia Twp. Bd. of Trustees*, 497 Mich. at 134.

[14] See Mark Cooney, "Style Is Substance: Collected Cases Showing Why It Matters," 14 Scribes J. Legal Writing 1, 37 (2012).

[15] "Syntactic ambiguity": "uncertainty over the order in which words and phrases appear and how they relate to each other." Kenneth A. Adams, "Bamboozled by A Comma: The Second Circuit's Misdiagnosis of Ambiguity in American International Group, Inc. v. Bank of America Corp.," 16 Scribes J. Legal Writing 45, 47 (2015).

[16] Jeffrey S. Ammon, "Ambiguous Drafting and the 12-Pound Cat," 90 Mich.B.J. 56 (2011).

individual less than 13 years of age" apply to "A person convicted under section 520b" as well as to a person convicted under 520c, or *only* to a person convicted under 520c? As with Mr. Ammon's example of the sign at the kennel, "We accept only cats and dogs weighing less than 10 pounds," which raises the question of whether a customer may board a 12-pound cat, it is not clear under the statute whether the trailing modifying phrase applies to both nouns or only the last. In a series of unpublished opinions, the Court of Appeals held that the trailing phrase applies to both nouns, but, the People believe, overstated the case. First, in *People v. Bowman*[17] the court found that lifetime electronic monitoring is inapplicable for a CSC 1 conviction where the victim was not under the age of 13, though with almost no discussion, given the prosecution's concession on the point.[18] The unpublished troika of *People v. Quintana*,[19] *People v. Floyd*,[20] and *People v. Hampton*[21] all say essentially that the statutory text is unambiguous, so that application of canons of construction is

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[17] *People v. Bowman*, (No. 292415, 11-9-2010), 2010 WL 4483698 (2010) (Judges Zahra, Talbot, and Meter on the panel).

[18] "Defendant alleges that the trial court erred in imposing such a sanction since, pursuant to MCL 750.520n, the sanction is only invoked where the victim is less than 13 years old. Here, it is undisputed that the complainant was 14 years old at the time of defendant's offenses. The prosecution concedes that the trial court erred in imposing the lifetime tether requirement. Accordingly, we remand to the trial court for it to engage in the ministerial task of removing the lifetime tether provision from defendant's judgment of sentence." *People v. Bowman*, 2010 WL 4483698, at 5.

[19] *People v. Quintana*, (No. 295324, 5-19-2011), 2011 WL 1901942, at 6: "[T]he statutory language is unambiguous." (Judges Cavanagh, Talbot, and Stephens).

[20] *People v. Floyd*, (No. 297393, 9-20-2011), 2011 WL 4375096 (2011): saying that this holding is a "plain reading" of the statute (Judges M.J. Kelly, Owens, and Borrello).

[21] *People v. Hampton*, (No. 297224, 12-20-2011), 2011 WL 6376013 (2011): "the plain language of the statute as written requires the conclusion that defendant is entitled to have the lifetime electronic monitoring portion of his sentence vacated" (Judges Hoekstra, K.F. Kelly, and Beckering).

unnecessary. But again, a series followed by a trailing modifying phrase is quite often rife with ambiguity,[22] and this is the case here, as further developments have demonstrated. In *Brantley* the defendant was convicted of CSC 1 where the victim was not under the age of 13. His sentence included lifetime electronic monitoring, and the Court of Appeals upheld that requirement, rejecting the "plain-text" views of the unpublished opinions.[23] The court turned to context, finding that viewed contextually—and, as will be discussed, applying a canon of construction, the last-antecedent canon—the trailing modifying phase refers *only* to MCL 750.520c. What, then, of context, relied upon in *Brantley*?

3. The statutory context: MCL 750.520b and MCL 750.520c

Before *Brantley*, the unpublished *Quintana* opinion itself also considered context, placing MCL 750.520n in its context with the offenses to which it refers, CSC 1 (section 520b) and CSC 2 (section 520c). The court noted that the penalty provision of MCL 750.520(b), subsection (2)(d), provides that "In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n." Emphasizing that this statutory provision provides that lifetime electronic monitoring shall be imposed "*under section 520n*" (emphasis in the original), the panel said that it could not disregard this "specific language utilized by the legislature," and concluded that "although the legislature may have intended to subject all individuals convicted first-degree CSC to lifetime electronic monitoring, . . . MCL 750.520b(2)(d) explicitly references MCL 750.520n, *which only applies where the victim is younger*

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[22] See Joseph Kimble, "The Puzzle of Trailing Modifiers," 95 Mich. B.J. 38, 39 (2016).

[23] "[A]lthough we are fully cognizant of the rule of interpretation requiring adherence to the plain language of a statute, we refuse to look at the language in a vacuum and ignore other clearly relevant statutory rules of construction." *People v. Brantley*, 296 Mich.App. at 557.

than 13. For this Court to accept the prosecution's interpretation of MCL 750.520b(2)(d), it would essentially be required to ignore that provision's reference to MCL 750.520n"; that is, "if the legislature desired to subject all individuals convicted of first-degree CSC to lifetime electronic monitoring, the controlling statute would not have included the language . . . 'under section 520n.'"[24] While this contextual analysis makes sense as far it goes, it also simply assumes without discussion that the trailing modifying phrase in section 520n applies to both sections 520b and 520c.

These opinions, being unpublished, set no precedent, and so the majority of the panel in *Brantley* was free to disregard them,[25] and disregard them it did. Though the majority said that defendant's argument that he should not have been sentenced to lifetime electronic monitoring for his CSC 1 conviction where his victim was 21 "was compelling,"[26] the court rejected it nonetheless, repudiating the unpublished Court of Appeals opinions along the way. Context was critical to the majority, as it was of the view that "Taken alone, the language of MCL 750.520n(1) does seem to indicate that a trial court must order a defendant who is convicted of CSC–I to submit to lifetime electronic monitoring *only* if the defendant was 17 years old or older and the victim was less than 13 years old."[27] MCL 750.520b(2)(d), however, said the majority, simply states, concerning a CSC 1 conviction, that "[i]n addition to any other penalty imposed . . . the court shall sentence the

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[24] *People v. Quintana*, 2011 WL 1901942, at 6 (emphasis supplied). The panel's statement that "the statutory language is unambiguous" is rather an overstatement. It is also passing strange that at least this first holding on the point was not published, if not also *Floyd* and *Hampton*.

[25] *Brantley* was written by Judge Jansen, joined by Judge Whitbeck, with Judge Kirsten Frank Kelly dissenting.

[26] *People v. Brantley*, 296 Mich. App. at 556.

[27] *People v. Brantley*, 296 Mich. App. at 557.

defendant to lifetime electronic monitoring under section 520n"; this provision, specific to CSC 1, says nothing about the age of the defendant or the age of the victim. "In contrast," continued the majority, MCL 750.520c(2)(b), concerning CSC 2 convictions, says that "'[i]n addition to the penalty specified in [MCL 750.520c(2)(a)], the court shall sentence the defendant to lifetime electronic monitoring under section 520n *if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.*'"[28] From this context the majority concluded that "If the Legislature had intended the age-based limitation to apply to CSC–I convictions, it would have so provided, given that, as MCL 750.520c(2)(b) demonstrates, it clearly was aware of how to draft the statute in a way that would have effectuated that intent. And the omission in one part of a statute of a provision that is included in another part should be construed as intentional. . . . . Accordingly, we read MCL 750.520n(1) as requiring the trial court to impose lifetime electronic monitoring in either of two different circumstances: (1) when any defendant is convicted of CSC–I . . . and (2) when a defendant who is 17 years old or older is convicted of CSC–II . . . against a victim who is less than 13 years old."[29]

This contextual point is perhaps the strongest argument in favor of application of the age limitations only to CSC 2 convictions. But while it is true that the legislature could have included the age limitations in MCL 750.520b(2)(d), it also did not stop the statutory text, as it also readily could have, after "In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring." Rather, it included also "under section 520n." The point of the contextual analysis in *Quintana* was that *thi*s portion of the statutory

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[28] *People v. Brantley*, 296 Mich. App. at 558 (emphasis added by the court)..

[29] *People v. Brantley*, 296 Mich. App. at 558-559.

text cannot be ignored, as "Under the rules of statutory interpretation, we cannot simply disregard the specific language utilized by the legislature."[30] The *Brantley* majority did not rebut or distinguish this point that the language "under 520n" must be given effect, and not rendered nugatory or surplusage by construction. What does it mean, then, to say that a defendant convicted of CSC 1 shall be sentenced to lifetime electronic monitoring "*under* section 520n"? Bryan Garner's *Modern Legal Usage* says that "under law" means "in accordance with the law."[31] "Under" a specific law would, then, denote "in accordance with," "consistent with," or "pursuant to" that law, so that MCL 750.520b(2)(d) thus provides that a person convicted of CSC 1 shall be sentenced to lifetime electronic monitoring "in accordance with" section 520n. This brings the matter full circle—what does the trailing modifying phrase modify in section 520n? Context does not appear to supply a satisfactory answer.[32]

4. The battle of the canons: the last-antecedent canon vs. the series-qualifier canon[33]

The *Brantley* majority also buttressed its opinion by application of the "last-antecedent canon" of statutory construction. The majority said that under this canon "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last

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[30] *People v. Quintana*, 2011 WL 1901942, at 6. And see *Hannay v. Dep't of Transp.*, 497 Mich. 45, 57 (2014): "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."

[31] Bryan Garner, *Modern Legal Usage* (2nd Edition), p. 897.

[32] The People will later discuss whether legislative history gives an meaning to this context.

[33] Also known as the "across-the-board" canon or rule. See Lawrence M. Solan, *The Language of Judges*, p. 34-37.

antecedent unless something in the statute requires a different interpretation," so that here, "the last antecedent preceding the modifying phrase 'for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age' is '[] 520c,' indicating that the Legislature intended the phrase to modify '[] 520c' only."[34] One commentator has referred to the canon as "an obscure and weak grammatical canon,"[35] and another has said that "the Rule is flexible, and . . . it is typically applied only where there is no contraindication from legislative history or another source that the statute in question is intended to convey a meaning different than application of the Rule would permit. Indeed, the Rule is so flexible that calling it a rule at all may be oxymoronic."[36] But the canon *does* have deep roots in our jurisprudence, though it appears to have been honored as much in the breach as in the following. For example, in 1807 in *Ex Parte Bollman*[37] the Court declined to apply the rule, though recognizing its existence. Two defendants were imprisoned for treason, and Bollman sought habeas corpus. A provision of the Judicial Act said that "[A]ll the before mentioned courts of the United States shall have the power to issue writs of scire facias, habeas corpus, and all other writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages

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[34] *People v. Brantley*, 296 Mich.App. at 557, the court citing *Duffy v. Dep't of Natural Resources,* 490 Mich. 198, 220–221 (2011); *People v. Henderson,* 282 Mich.App. 307, 328 (2009).

[35] Aaron Andrew P. Bruhl, "Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation," 100 Minn. L. Rev. 481, 540 (2015)

[36] Jeremy L. Ross, "A Rule of Last Resort: A History of the Doctrine of the Last Antecedent in the United States Supreme Court," 39 Sw. L. Rev. 325, 336 (2009).

[37] *Ex Part Bollman*, 8 U.S. (4 Cranch) 75, 127 (1807).

of law." The last-antecedent canon, if applied, would have limited the trailing modifying phrase "which may be necessary for the exercise of their respective jurisdictions" to the last of the series—the last antecedent—"all other writs, not specifically provided for by statute." Chief Justice Marshall declined to apply the rule, though it had been "urged, that in strict grammatical construction, these words refer to the last antecedent," a principle which Chief Justice Marshall found to be "not entirely without influence."[38] But the Court held nonetheless that "the true sense of the words" and their context required that the modifying clause apply to each antecedent in the statute—"the proviso applies to the whole section"[39]—rather than only the last.[40]

Similarly, in what appears to be this Court's first discussion of the rule, its application was rejected.[41] The statute under review provided that "all persons, companies, or corporations operating any factory or workshop, where *emery wheels or emery belts of any description are used*, either solid emery, leather, leather covered, felt, canvas, linen, paper, cotton, or wheels or belts rolled or coated with emery or corundum, or cotton wheels used as buffs, shall provide the same with blowers. . . ." The problem was the phrase "emery wheels or emery belts of any description." Did the trailing modifier "of any description" refer to emery wheels and emery belts, or only to the last antecedent, "emery belts"?[42] Noting with understatement that the question was "one which is not altogether

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[38] *Ex Part Bollman*, 8 U.S. (4 Cranch) at 95.

[39] *Ex Part Bollman*, 8 U.S. (4 Cranch) at 99.

[40] *Ex Part Bollman*, 8 U.S. (4 Cranch) at 95.

[41] *Drake v. Indus. Works*, 174 Mich. 622 (1913).

[42] One might note the parallel with the present case. Here, A [section 520b] or B [section 520c] modified by C [committed by an individual 17 years old or older against an individual less than 13 years of age], and *Drake,* A [emery wheels] or B [emery belts] modified by C [of any

clear," this Court observed that if Sutherland's work on statutory construction were to be followed, then the qualifying phrase would attach only to the last antecedent, Sutherland saying that "Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent."[43] But the Court instead applied the modifying phrase to both antecedents, saying that "a contrary intention" to application of the last-antecedent rule *did* appear in the act "when its history, purpose, and context are considered."[44]

The last-antecedent canon has been applied to limit a trailing modifying term or phrase to the last of a series in several recent United States Supreme Court cases, *Barnhart v. Thomas*[45] being recognized as a leading authority since the unanimous decision in 2003. The statutory phrase at issue was "An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." Did the trailing modifying phrase "which exists in the national economy" apply only to the last antecedent, "engage in any other kind of substantial gainful work," or did it also apply to "previous work"? The claimant, Thomas,

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description].

[43] *Drake v. Indus. Works*, 174 Mich. at 625-626.

[44] The Court did not expand upon the act's history, purpose, and context, other than in its discussion of another section, where it noted that "the idea behind the legislation was the protection of the employé, external as well as internal, from the injurious effects of the dust thrown from such apparatus, as is mentioned in the statute. If this be the reason for it, no good reason suggests itself why solid emery wheels should be exempted from the act, as the dust therefrom is quite as injurious as that thrown from the other apparatus specifically enumerated." *Drake v. Indus. Works*, 174 Mich. at 625.

[45] *Barnhart v. Thomas*, 540 U.S. 20, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003).

argued he was disabled from "substantial gainful work which exists in the national economy," but he was not disabled from his previous work as an elevator operator, a job which had been eliminated. The Third Circuit held that the statutory language meant that the ability to perform prior work disqualified one from benefits only if it was substantial gainful work which exists in the national economy; that is, that the modifier applied to both antecedents. The Supreme Court unanimously disagreed.

The Court applied the last-antecedent canon, observing that the Third Circuit's reading of the statute was precisely contrary to that rule, the Court describing the rule as providing that "a limiting clause or phrase (here, the relative clause 'which exists in the national economy') should ordinarily be read as modifying only the noun or phrase that it immediately follows (here, 'any other kind of substantial gainful work')."[46] The Court recognized, however, that "this rule is not an absolute and can assuredly be overcome by other indicia of meaning," but also said that "construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'"[47] The Court provided an interesting colloquial example:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from

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[46] *Barnhart v. Thomas*, 124 S. Ct. at 380.

[47] *Barnhart v. Thomas*, 124 S. Ct. at 380. The Court did not say the canon *is* a rule of grammar, and it is not. See Solan, supra, p. 31 ("the rule is best viewed as a strategy for interpreting modifying clauses as opposed to an absolute prohibition against certain interpretations" as opposed to falling within "rules of grammar, which make certain interpretations impossible").

> what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house—for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically prohibiting the one activity—hosting a party—that was most likely to cause damage and most likely to occur.[48]

The canon was applied again in the very recent and intriguing case of *Lockhart v. United States*.[49] The statutory text at issue was:

> Whoever violates, or attempts or conspires to violate [18 U.S.C. § 2252(a)(4)] shall be fined under this title or imprisoned not more than 10 years, or both, but ... if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State *relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

The statute was a sentence enhancement of "not less than 10 nor more than 20 years," and the question was whether the limiting phrase "involving a minor or ward" trailing the series of three offenses—"aggravated sexual abuse, sexual abuse, or abusive sexual conduct"—applied only to the last antecedent, or to all three. Observing that the statute's "list of state predicates is awkwardly

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[48] *Barnhart v. Thomas*, 124 S. Ct. at 380. But consider the 12-pound cat where the kennel warns "we accept only cats and dogs under 10 pounds."

[49] *Lockhart v. United States*, 136 S. Ct. 958, __L.Ed.2d__ (2016).

But quoting the statement in *Barnhart* that the last-antecedent canon "is not an absolute and can assuredly be overcome by other indicia of meaning," the Court declined to follow it in *United States v. Hayes*, 555 U.S. 415, 425, 129 S. Ct. 1079, 1086, 172 L. Ed. 2d 816 (2009).

phrased (to put it charitably),"[50] the Court applied the last-antecedent canon to hold that the trailing modifying phrase applied only to the final offense. The rule reflects, said the Court, "the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it."[51] Application of the rule—which the Court referred to as an "interpretive strategy"—is particularly apt, continued the Court, "where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all."[52] As to the statute under consideration, then, "the last antecedent principle suggests that the phrase 'involving a minor or ward' modifies only the phrase that it immediately follows: 'abusive sexual conduct.' As a corollary, it also suggests that the phrases 'aggravated sexual abuse' and 'sexual abuse' are not so constrained."[53]

But application of the canon can be overcome by other indicia of meaning, and even by a different intuitive reading, as, noted the Court, pointed out by Justice Kagan's dissent with the phrase "the laws, the treaties, and the constitution of the United States," where a "reader intuitively applies 'of the United States' to 'the laws,' 'the treaties' and 'the constitution' . . . because the listed items are simple and parallel without unexpected internal modifiers or structure."[54] In contrast, the statute under consideration did not "contain items that readers are used to seeing listed together or a concluding modifier that readers are accustomed to applying to each of them. And the varied syntax

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[50] *Lockhart v. United States*, 136 S. Ct. at 962.

[51] *Lockhart v. United States*, 136 S. Ct. at 963.

[52] *Lockhart v. United States*, 136 S. Ct. at 963.

[53] *Lockhart v. United States*, 136 S. Ct. at 963.

[54] *Lockhart v. United States*, 136 S. Ct. at 963.

of each item in the list makes it hard for the reader to carry the final modifying clause across all three."[55] Finally, after examination, the Court concluded the context fortified the use of the last-antecedent canon, something with which Justice Kagan in dissent vigorously disagreed. The Court also rejected application of the "series-qualifier canon," making its first appearance in a Supreme Court opinion, at least using that terminology. Though the majority concluded that this canon did not here overcome the last-antecedent canon, it recognized that it had previously "declined to apply the rule of the last antecedent where '[n]o reason appears why' a modifying clause is not 'applicable as much to the first and other words as to the last' and . . . 'there is no reason consistent with any discernable purpose of the statute to apply' the limiting phrase to the last antecedent alone."[56]

Justice Kagan, in a most readable dissent, would have found that the series-qualifier canon overcame the last-antecedent canon. She began with examples of ordinary language:

> Imagine a friend told you that she hoped to meet "an actor, director, or producer involved with the new Star Wars movie." You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander. Suppose a real estate agent promised to find a client "a house, condo, or apartment in New York." Wouldn't the potential buyer be annoyed if the agent sent him information about condos in Maryland or California?[57]

Just as with these examples, said Justice Kagan, the modifying phrase "involving a minor or ward" applied to each of the three terms preceding it, not only the final one. *Barnhart* was not wrong, but readily distinguishable, for the "grammatical structure of the provision in *Barnhart* is nothing like

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[55] *Lockhart v. United States*, 136 S. Ct. at 963.

[56] *Lockhart v. United States*, 136 S. Ct. at 965.

[57] *Lockhart v. United States*, 136 S. Ct. 969.

that of the statute in this case: The modifying phrase does not, as here, immediately follow a list of multiple, parallel terms. That is true as well in the other instances in which this Court has followed the rule."[58] Citing to the treatise *Reading Law: The Interpretation of Legal Texts* by Justice Scalia and Bryan Garner, Justice Kagan quoted that work's series-qualifier canon: "When there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series,'"[59] as opposed to where the "'the syntax involves something other than [such] a parallel series of nouns or verbs,' [and] the modifier 'normally applies only to the nearest reasonable referent.'" This reflects, said Justice Kagan, "the completely ordinary way that people speak and listen, write and read."[60] And so Justice Kagan, joined by Justice Breyer, would have applied the series-qualifier canon.[61]

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[58] *Lockhart v. United States*, 136 S. Ct. 969.

[59] The series-qualifier canon was clearly stated, though without this name, by Justice Brandeis: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S. Ct. 516, 518, 64 L. Ed. 944 (1920) (citing cases).

[60] *Lockhart v. United States*, 136 S. Ct. 970 (the majority also cited the treatise). Citing examples, Justice Kagan also argued that "this Court has repeatedly applied the series-qualifier rule in just that manner." She further pointed out "Pick up a journal, or a book, or for that matter a Supreme Court opinion—most of which keep 'everyday' colloquialisms at a far distance. . . . You'll come across many sentences having the structure of the statutory provision at issue here: a few nouns followed by a modifying clause. And you'll discover, again and yet again, that the clause modifies every noun in the series, not just the last—in other words, that even (especially?) in formal writing, the series-qualifier principle works." *Lockhart v. United States*, 136 S. Ct. 972. See fn 2 of the dissent for examples from opinions.

[61] Justice Kagan concluded that, even if the matter was not so clear as she believed, at the least, then, the rule of lenity would apply, concluding "'The series-qualifier principle, the legislative history, and the rule of lenity discussed in this opinion all point in the same direction.' Now answer the following question: Has only the rule of lenity been discussed in this opinion, or have the series-qualifier principle and the legislative history been discussed as well? Even had

Though this Court has never employed the series-qualifier canon by name, the *Great Wolf Lodge* case cites the *Porto Rico* case[62] for the proposition that "when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."[63] And the Court has been cautious with application of the last-antecedent canon, on occasion declining to apply it, though on others employing it to decide the case.[64]

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you not read the preceding plus pages, you would know the right answer—because of the ordinary way all of us use language. That, in the end, is why Lockhart should win." *Lockhart v. United States*, 136 S. Ct. at 977.

Bryan Garner's blog lauded the discussion by both the majority and the dissent, and said: "How would Scalia J. have ruled? We believe he'd have joined the 6–2 dissent, making it 6–3, because of Justice Kagan's virtuoso analysis of the text and her invocation of the rule of lenity." LawProse Lesson #246: Last-Antecedent Canon vs. Series-Qualifier Canon. http://www.lawprose.org/lawprose-lesson-246-last-antecedent-canon-vs-series-qualifier-canon/

[62] See n. 59, supra.

[63] *Great Wolf Lodge of Traverse City, LLC v. Pub. Serv. Comm'n*, 489 Mich. 27, 45 (2011).

[64] Cf. *Hardaway v. Wayne Cty.*, 494 Mich. 423, 428 (2013) ("it bears emphasizing that the last antecedent rule should not be applied blindly. As we have warned before, the last antecedent rule should not be applied if 'something in the statute requires a different interpretation' than the one that would result from applying the rule"); *Duffy v. Michigan Dep't of Nat. Res.*, 490 Mich. 198, 221, 805 N.W.2d 399, 411 (2011) ("there are two indications that a different interpretation is required, and both direct us to follow the exception rather than the general rule and apply the restrictive clause to each of the preceding terms"); *People v. Small*, 467 Mich. 259, 263 (2002) ("We agree with the trial court, the Court of Appeals, and the prosecution that 'in lawful possession' only applies to the words 'in the presence of any other person' in the carjacking statute. We note that this construction is consistent with the common grammatical rule of construction that a modifying clause will be construed to modify only the last antecedent unless some language in the statute requires a different interpretation"); *Stanton v. City of Battle Creek*, 466 Mich. 611, 616 (2002) ("The 'last antecedent' rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation. . . . Applying this rule, the reference to § 257.1 to 257.923 in § 1405 defines 'owner,' not 'motor vehicle,' and nothing in the statute demands a

5. Legislative history

Does legislative history assist in resolving the ambiguity here—and what, in Michigan, *is* legislative history? This Court has said that where resort to legislative history is appropriate because of an ambiguity in statutory text, "the highest quality is legislative history that relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent with respect to an ambiguous statutory provision. . . . [including] actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted. . . . by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted."[65] On the other hand, this Court has said that

> Of considerably diminished quality as legislative history are forms that do not involve an act of the Legislature. 'Legislative analyses' created within the legislative branch . . . . are entitled to little judicial consideration in resolving ambiguous statutory provisions because: (1) such analyses are not an official form of legislative record in Michigan, (2) such analyses do not purport to represent the views of legislators, individually or collectively, but merely to set forth the views of professional staff offices situated within the legislative branch, and (3) such analyses are produced outside the boundaries of the legislative process as defined in the Michigan Constitution, and which is a prerequisite for the enactment of a law. . . . In no way can a 'legislative analysis' be said to officially summarize the intentions of those who have been designated by the Constitution to be participants in this legislative process, the members of the House and the Senate and the Governor. For that reason, legislative analyses should be accorded very little significance by courts when construing a statute.[66]

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different interpretation").

[65] *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich. 109, 115 (n5) (2003).

[66] *Id*.

House Bill 5421 was proposed on November 10, 2005, and concerned only CSC 1. With regard to penalty, though it created aggravating circumstances for sentencing, and these included age limitations,[67] it did not mention lifetime electronic monitoring at all. House Bill 5531 was proposed almost seven weeks later, on December 29, 2005. As proposed it contained *identical* provisions concerning lifetime electronic monitoring for both CSC 1 and CSC 2. With regard to CSC 1, the bill provided in paragraph (2)(b) as part of the punishment provisions that "(b) if the actor violates subsection (1)(a) [victim under 13], he or she shall be sentenced to lifetime electronic monitoring under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285." The bill provided identically with regard to CSC 2,[68] so that both CSC 1 and CSC 2 carried mandatory lifetime electronic monitoring requirements where the victim of the crime was under 13. This bill also created a new MCL 750.520n, but this provision did not concern a sentence to lifetime monitoring,

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[67] Section (2)(b) provided that the a person convicted "for a violation of subsection (1)(a) [victim under 13] that is committed by an individual 17 years of age or older and accomplished while armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon or through force or coercion, by imprisonment for life or any term of years, but not less than 25 years."

[68] Though, as indicated, this Court has rightly said that of "considerably diminished quality as legislative history are forms that do not involve an act of the Legislature" so that "'Legislative analyses' created within the legislative branch . . . . are entitled to little judicial consideration in resolving ambiguous statutory provisions," it is at least interesting to note that here, where it is clear that the bill required electronic monitoring for convictions *both* for CSC 1 and CSC 2 *only* when, in *either* case, the victim was under the age of 13, the House Fiscal analysis employed the same trailing-modifier sentence construction that causes the ambiguity here. That Analysis says that the bill "would require that a person who is found guilty of criminal sexual conduct in the first degree or in the second degree against a person under 13 years of age be sentenced to lifetime electronic monitoring." Under the *Brantley* last-antecedent canon construction, the Fiscal Analysis would here be describing the bill as requiring electronic monitoring for all CSC 1 convictions, and for those CSC 2 convictions "against a person under 13 years of age," when it is clear from the actual bill that the Analysis means to describe the bill as requiring electronic monitoring in *either* situation *only* where the victim is under 13 years of age.

as it now provides, as that had been provided for in the new paragraphs (2)(b) for both CSC 1 and CSC 2. Instead section 520n created offenses that might be committed by those sentenced to lifetime monitoring pertaining to interference with that monitoring.[69]

On March 14, 2006, both bills were passed by the House. HB 5531 dropped all reference to CSC 1. As to CSC 2 and electronic monitoring, HB 5531 now provided in (2)(b) that "in addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age." The new MCL 750.520n now included more than simply crimes committed by those on lifetime electronic monitoring by interference with monitoring, also containing a new paragraph (1) providing: "A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the Corrections Code of 1953, 1953 PA 232, MCL 791.285." When HB 5531 was passed on March 14, 2006, tie-barred with HB 5421, subsection(2)(d)[70] now appeared concerning lifetime electronic monitoring: "in addition to any other

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[69] "(1) A person who has been sentenced under this chapter to lifetime electronic monitoring under section 85 of the Corrections Code of 1953, 1953 PA 232, MCL 791.285, who does any of the following is guilty of a felony . . . ," including such things as removing , destroying, defacing, altering, or failing to maintain the monitoring device in working order.

[70] Paragraph (2)(b) provided an aggravated penalty with age qualifications: "For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years." Paragraph (2)(c) also contained an enhanced penalty with age qualifications, providing that "for a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age and accomplished while armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon or through force and coercion" the penalty was "imprisonment for life without the possibility of parole if the

penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n." This section was approved by the Senate,[71] and was enacted in Act 169, May 29, 2006, the same day as Act 161, to which it was tie-barred.

In the end, again the analysis comes full circle. One bill included a requirement for lifetime electronic monitoring where the victim was under the age of 13 years for both CSC 1 and CSC 2, while the other, concerning CSC 1 only, had no lifetime electronic monitoring requirement, but an aggravated penalty where the victim was under 13 and the defendant 17 years of age or older. The bills were considered together, and the one dropped all reference to CSC 1, maintaining its lifetime electronic monitoring sentence for CSC 2 where the victim was under 13 but adding that the defendant had also to be 17 years of age or older. The second, while continuing to aggravate the penalty in some circumstances when the victim was under the age of 13 and the defendant 17 years of age or older, also added a requirement of lifetime electronic monitoring "under 520n." And 520n

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person was previously convicted of violating section 520b, 520c, 520d, or 520e."

[71] Though entitled to little weight, it is interesting that the Senate Fiscal Analysis is inconsistent. In an introduction section giving an overall description of what both HB 5421 and HB 5531 would accomplish, the analysis says they would "Require a sentence of lifetime electronic monitoring for a defendant convicted of first-degree CSC, in addition to any other penalty." In the section of the analysis concerning HB 5531, the analysis says the bills "would require that a person convicted of first-degree or second-degree CSC be sentenced to lifetime electronic monitoring if the victim were under 13 and the offender were at least 17," which, in its construction, which differs from the trailing-modifier phraseology employed in MCL 750.520n, strongly suggests that the modifying limiting phrase "if the victim were under 13 years and the offender were at least 17" applies to convictions of *both* CSC 1 and CSC 2 ("would require that a person convicted of first-degree or second degree . . . be sentenced to lifetime electronic monitoring if . . . .").

Again, these analysis are of extremely limited utility; particularly given this context, that the analysis in one portion says that the bills "Require a sentence of lifetime electronic monitoring for a defendant convicted of first-degree CSC, in addition to any other penalty" means virtually nothing in resolving the ambiguity of the trailing-modifier usage here, especially given the inconsistency within the analysis itself.

itself, which was first created without reference to sentencing to lifetime electronic monitoring, but only to crimes committing by those on lifetime electronic monitoring by interfering with the monitoring, later added a paragraph (1), the language now at issue. This returns the analysis to context—does the absence of a reference to the age limitations in MCL 750.520b when age limitations appear in MCL 750.520c outweigh the fact that MCL 750.520b—and 750.520c, for that matter—refers to lifetime electronic monitoring "*under* section 520n," with its trailing modifying phrase, which is what causes the ambiguity in the first place? Legislative history does not seem to aid much in the inquiry.

6. The rule of lenity

The rule of lenity must be considered with great caution, the People believe, for it is often not difficult to imagine two constructions of a statute, declare them both reasonable, and thus posit that the one most favorable to the defendant should prevail. This is not the rule of lenity. "The rule comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."[72] A statute is not ambiguous for purposes of application of the rule of lenity simply because it is "*possible* to articulate a construction more narrow than that urged by the Government. . . . Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. . . . If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts . . . Instead, we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and

[72] *Gozlon-Peretz v. United States*, 498 U.S. 395, 410, 111 S. Ct. 840, 849, 112 L. Ed. 2d 919 (1991).

motivating policies' of the statute."[73] A court should rely on the rule of lenity only if "[a]fter 'seiz[ing] every thing from which aid can be derived,' it is 'left with an ambiguous statute.'"[74] Put another way, the rule of lenity applies "only if, 'after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what [the legislature] intended.'"[75]

7. Conclusion

In the *Porto Rico* case, the trailing modifying phrase in the clause "or citizens of a state, territory, or district of the United States *not domiciled in Porto Rico*" was held to apply to the entire list, not only the last antecedent, on the ground that "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." In *Lockhart*, the trailing modifier in the clause "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward*" was held to apply to only the last-antecedent. In *Drake*, the trailing modifier in the clause "emery wheels or emery belts *of any description*" was held to apply to both nouns, and not only the last antecedent. In the example, "we board only cats and dogs under 10 pounds," most would intuit that they cannot board their 12-pound cat. In the example, "you will be punished if while we are gone you hold a party or engage in any other activity that damages the house," most would intuit that one is subject to punishment for holding a party even if it does not cause damage.

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[73] *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 465, 112 L. Ed. 2d 449 (1990).

[74] *United States v. Bass,* 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971), quoting *United States v. Fisher,* 2 Cranch 358, 386, 2 L.Ed. 304 (1805) (Marshall, C.J.).

[75] *Abramski v. United States*, 134 S. Ct. 2259, 2272, 189 L. Ed. 2d 262 (2014).

Here, the trailing modifying phrase "committed by an individual 17 years or older against an individual less than 13 years of age" in the provision "A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring" does not appear subject to intuition.[76] Resolution of the matter comes down, it seems, to three points:

1. Is the syntax of the sentence such that the last-antecedent canon should apply—is it of the sort "where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all"[77]—or is the structure such that "there is a

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[76] Why legislatures employ this form of drafting is somewhat mystifying. If the legislature wished the age limitations unambiguously to apply only to CSC 2, it had only to say something on the order of:

> A person convicted under section 520b shall be sentenced to lifetime electronic monitoring, as shall a person convicted under 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age.

Indeed, even repeating the use of "under" before the second antecedent, setting off the phrase with commas, would have done the trick: "A person convicted under section 520b, or under 520c for criminal sexual conducted committed by an individual 17 years or older against an individual less than 13 years of age, ..." See Thomas Myers, "Clearing Up Ambiguity From A Series Modifier," 90 Mich. B.J. 52, 53 (2011).

To apply the age limitations unambiguously to *both* CSC 1 and CSC 2, the statute could read:

> Where the conviction is for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age, a person convicted under section 520b or 520c shall be sentenced to lifetime electronic monitoring.

The first of these may be somewhat longer than the current statute, but as the Federalist "Mark Antony" said in reply to the anti-federalist "Brutus" in the Boston Independent Chronicle, January 10, 1788**,** regarding a suggested redrafting of a provision of the new Constitution so as to be more "concise," but which in fact changed the meaning of the provision, ""It frequently happens that precision is lost in conciseness."

[77] Solan, supra, p. 33-34, notes that where the "list" is two nouns or noun phrases the intuitive interpretive preference is to apply the modifying phrase to both conjuncts, as in "John saw a woman and a man with a young child," where the preferred reading is that the young child

straightforward, parallel construction that involves all nouns or verbs in a series," so that the trailing modifier "normally applies to the series"?[78]

2. Does the fact that MCL 750.520b(2)(d) has no specific reference to the age-limitations, saying only that lifetime electronic monitoring shall be imposed "under section 520n," while MCL 750.520c(2)(b) says "the court shall sentence the defendant to lifetime electronic monitoring under section 520n *if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age*," overcome, as a matter of context, that the referral in MCL 750.520b(2)(d) to lifetime electronic monitoring "under section 520n" would appear to require electronic monitoring be imposed "in accordance with" section 520n, bringing the matter back to the proper application of the trailing modifying phrase?

3. Does the legislative history, which includes the dropping of reference to CSC 1 from one bill, the inclusion of specific age-limitation language in that bill as to CSC 2, and the addition of a lifetime electronic monitoring requirement in the CSC 1 bill with no reference to age, but with text saying that the lifetime electronic monitoring is to be imposed "under section 520," suggest that the last-antecedent canon should apply; that is to say, does the history suggest with regard to CSC 1 a concern with the aggravating fact of penetration or with protection of those victims under the age of 13?

If, in the end, after considering text, context, and history, including the application of canons of construction, "there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to [the legislature] intended," the rule of lenity requires that here the series-qualifier canon be followed to resolve the matter by striking the electronic-monitoring requirement from the sentence. If this is done, the remaining issue here is moot. If, on the other hand, the Court

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was with both the woman and the man, rather than only with the last antecedent, the man.

[78] A. Scalia and B. Garner, *Reading Law*, p. 144, 147.

determines, after considering text, context, and history, including the application of canons of construction, that the trailing modifying phrase applies only to the last antecedent, section 520c, then the remaining question must be answered to resolve this case.

B. If All CSC 1 Convictions require a sentence including lifetime electronic monitoring, then the trial judge here had authority to correct the invalid sentence, as it failed to include a mandatory term required by law

1. The text of the pertinent rules

MCR 6.429 is titled "Correction and Appeal of Sentence," and provides in paragraphs (A) and (B):

> **(A) Authority to Modify Sentence.** A motion to correct an invalid sentence may be filed by either party. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.
>
> **(B) Time for Filing Motion**.
>
> > (1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.
> >
> > (2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
> >
> > (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.
> >
> > (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

MCR 6.435 is titled "Correcting Mistakes," and provides:

> **(A) Clerical Mistakes**. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission

> may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
>
> **(B) Substantive Mistakes**. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.
>
> **(C) Correction of Record**. If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected.
>
> **(D) Correction During Appeal**. If a claim of appeal has been filed or leave to appeal granted in the case, corrections under this rule are subject to MCR 7.208() and (B).

2. Construction and application of the rules

In *People v Harris*[79] the defendant, who had provided a false name, was convicted of possession with intent to deliver under 50 grams of cocaine, and received a sentence of 2 ½ to 20 years. The Department of Corrections discovered his true identity over a year later, and notified the trial court that Harris was an escapee, and so his sentence was required by statute to be consecutive to the sentence he was serving when he escaped. The trial court held a hearing, and concluded that the sentence given was based on inaccurate information due to the fraud on the court perpetrated by Harris, set aside the sentence, conducted a new sentencing hearing, and sentenced Harris to 8-20 years, consecutive to the sentence he was serving when he escaped. Defendant argued that the trial court lacked authority to correct the sentence in this way.

[79] *People v. Harris*, 224 Mich. App. 597 (1997).

The Court of Appeals disagreed. Citing MCR 6.429(A), the court said that a "sentence may be invalid no matter who is benefitted by the error."[80] The sentence was invalid, the court concluded, because contrary to law—it was not consecutive to the offense for which defendant was an escapee, as required by statute—and because based on inaccurate information caused by a fraud on the court. Thus, the "threshold requirement of MCR 6.429(A) that a sentence be invalid was satisfied."[81] Did, then, the time lapse of one year prevent the court "from exercising its authority to correct the sentence"?[82] The court held not. Though the rule contains time limits for parties to move for resentencing, the court concluded that nothing in MCR 6.429(A) requires a motion for resentencing as "a condition precedent for a trial court to correct an invalid sentence," nor does the rule set time limits on the trial court's authority. The court "decline[d] to construe this court rule as containing a jurisdictional time limitation. Therefore, there was no impediment relative to the time of the trial court's decision in the case at bar that would preclude it from ordering a resentencing pursuant to MCR 6.429(A)."[83]

The court also relied on this Court's decision in *People v. Miles*,[84] which is instructive on the issue, and not cited in the dissenting opinion in the present case, which disagrees with the *Harris* decision (nor in the majority opinion, as that opinion simply relies on *Harris*). Miles pled guilty to armed robbery and felony-firearm. The presentence report did not note that the conviction for

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[80] *People v. Harris*, 224 Mich. App. at 600.

[81] *People v. Harris*, 224 Mich. App. at 600.

[82] *People v. Harris*, 224 Mich. App. at 600.

[83] *People v. Harris*, 224 Mich. App. at 601.

[84] *People v. Miles,* 454 Mich. 90 (1997).

felony-firearm was his second for that offense, nor did the parties raise the point at sentencing. Miles was thus sentenced to two years, consecutive to his armed robbery sentence, while the statute required that his felony-firearm sentence be five years, consecutive to the underlying felony.[85] The sentence was thus contrary to law. Six weeks after sentencing, the Department of Corrections sent a letter to the trial court informing it of its mistake. After the Department provided the docket number, the date, and the name of the sentencing judge for the prior conviction, the trial court sua sponte amended the sentence, changing the felony-firearm sentence to five years. This was done without a hearing or notice to the parties. This Court stated the question as "whether the trial court had the authority to modify defendant's felony-firearm sentence from two to five years, sua sponte and without a resentencing hearing, when it learned after sentencing that defendant had previously been convicted of felony-firearm."[86]

Citing MCR 6.429(A), this Court said that "the court may correct an invalid sentence after sentencing," and so the question was whether the felony-firearm sentence initially imposed was invalid;[87] this Court also observed that though the rule did not directly contemplate correction of errors benefitting the defendant, an invalid sentence in defendant's favor was correctable under the rule.[88] Defining a sentence as invalid "when it is beyond statutory limits, when it is based upon

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[85] MCL 750.227b(1), (3): "Upon a second conviction under this subsection, the person shall be punished by imprisonment for 5 years. . . .and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony."

[86] *People v. Miles*, 454 Mich. at 94.

[87] *People v. Miles*, 454 Mich. at 96.

[88] "The staff comment accompanying M.C.R. § 6.429(A) states, ' [i]nvalid sentence' refers to any error or defect in the sentence or sentencing procedure that entitles a defendant to be

constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts,"[89] this Court concluded that "the original felony-firearm sentence was invalid and subject to modification by the trial court under M.C.R. 6.429(A)." The trial court, however, should not have amended the sentence without a hearing. Though finding the circumstances "unique, given the fact that the inaccuracy involved a mandatory sentencing scheme under which the trial court had no discretion," this Court nonetheless held that the trial judge should have held a hearing, at which Miles had a right to be resentenced only on the underlying felony—his concession that he had been previously convicted of felony-firearm rendered the failure to hold a hearing as to that offense harmless—at which the trial court could "raise or lower the armed robbery sentence, or . . . leave the sentence unchanged. And . . .the court [was] not bound to consider the length of the consecutive mandatory sentence for felony-firearm under *Milbourn's* principle of proportionality because each sentence [was] a separate determination."[90]

This Court, then, found that MCR 6.429(A) authorized the trial judge to correct an invalid sentence sua sponte, and without reference to any time limitation. Where that invalidity was conceded by the defendant, a failure to hold a hearing on the correction was harmless, though, where

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resentenced or to have the sentence changed.' Although the staff comment seems to anticipate that a sentence will be invalid when the error operates against a defendant, sentences have been held invalid even when the error operated in a defendant's favor. A sentence may be invalid no matter whom the error benefits . . ." *People v. Miles*, 454 Mich. at 97-98.

[89] *People v. Miles*, 454 Mich. at 96.

[90] *People v. Miles*, 454 Mich. at 100-101. Justice Boyle would have held that because the "trial court had no discretion with regard to the sentence for the separate felony firearm offense; thus, *its correction nunc pro tunc, was a ministerial act* not requiring a resentencing hearing" (emphasis supplied)" *People v. Miles*, 454 Mich. at 105 (Boyle, J., dissenting from remand).

the correction added time to the defendant's sentence on a count, the defendant was entitled to a resentencing hearing on the remaining count. Here the invalidity of the sentence was not in its imposition of time in prison, but the failure to include a mandatory term—if that term is applicable, see part A.— as directed by the legislature in MCL 750.520n. And a hearing was held, at which the defendant declined an offer to withdraw the plea.

Justice Markman, joined by Justice Cavanagh, expressed concern in *People v. Peck*[91] not with the fact of a correction of an invalid sentence by the trial court where the invalidity benefitted the defendant, but with its timing. That concern is well taken. In *Peck* the trial judge erroneously imposed a maximum sentence of five years where the statute required a maximum term of fifteen years. One month before defendant would have completed the term as imposed, the trial court corrected the invalid sentence. Justice Markman noted that this situation was "extraordinary," and, without expressing his view on the outcome, would have remanded the case to the Court of Appeals as on leave granted to consider "whether defendant's constitutional or statutory rights were in any way implicated by the timing of events in this case."[92] There *are* cases suggesting that in extreme cases the correction of an invalid sentence by adding time to the sentence—time required by

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[91] *People v. Peck*, 481 Mich. 863 (2008).

[92] *People v. Peck*, 481 Mich. at 867 (Markman, J., dissenting from the denial of leave). Justice Corrigan, concurring in the denial of leave, cogently noted that "trial judges are not generally precluded from correcting substantive mistakes in their judgments. Rather, under MCR 6.429, a judge may correct an invalid judgment—and may even correct a valid judgment "as provided by law"—even after judgment has entered. . . . the judge in this case appropriately corrected the error. Most significantly, defendant has not suffered injustice; his sentence was merely conformed to the correct statutory maximum, of which he was informed when he pleaded guilty of second-degree home invasion and again when he pleaded guilty to violating probation. Indeed, were we to conclude that resentencing is required, the judge would simply be bound to impose the correct 15–year maximum upon resentencing." *People v. Peck*, 481 Mich. at 867-868 (Corrigan, J., concurring in the denial of leave).

statute—can violate due process rights of the defendant. For example, the Third Circuit has said that, though rejecting defendant's claim, it did not "utterly reject that there might be a 'temporal limit' on a court's ability to correct a sentencing problem." On the other hand, the court also said that "'[a] defendant . . . does not automatically acquire a vested interest in a shorter, but incorrect sentence. It is only in an extreme case that a later upward revision of a sentence is so unfair that it is inconsistent with the fundamental notions of fairness found in the due process clause.'"[93] This is not such a case. Here, sentencing occurred on October 8, 2012.[94] Close to four months later, on January 29, 2013, the Department of Corrections informed the trial court that under the *Brantley* decision the sentence should have included lifetime electronic monitoring upon the conclusion of the term of incarceration. *Brantley* was decided after the original sentencing, but before the second sentence was imposed.[95] The trial court heard argument on the matter, and the result of that hearing was an amendment of the sentence on April 29, 2013, with defendant declining an opportunity to withdraw his plea given the added term of the sentence. The lifetime-electronic-monitoring term was thus added somewhat short of seven months after the resentencing, and apparently twenty months after the original sentence that was vacated for other reasons. Defendant was serving a sentence of 42 months to 18 years, and thus had a fair period left on his sentence before the term of

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[93] *Evans v. Sec'y Pennsylvania Dep't of Corr.*, 645 F.3d 650, 661-662 (CA 3, 2011). See also *United States v. Lundien,* 769 F.2d 981, 987 (CA 4, 1985); *United States v. Sanders*, 452 F.3d 472 (CA 6, 2006); *State v. Calmes*, 632 N.W.2d 641 (Minn., 2001).

[94] This was a resentencing, and at neither sentencing did the trial judge impose lifetime electronic monitoring; the operative date, however, is the resentencing date, as a resentencing is a de novo matter. *People v. Davis*, 300 Mich.App 502, 509 (2013), vacated on other grounds by *People v. Hardy*, 494 Mich. 430, 438 (2013) ("at resentencing, every aspect of the sentence is before the judge de novo").

[95] *Brantley* was decided May 17, 2012.

lifetime electronic monitoring would be effective. And he was given the opportunity to opt out of his plea because of the addition of this statutorily mandated term (again, if it *is* mandated by the statute). This situation does not begin to approach those extreme situations discussed in the federal cases;[96] indeed, though the condition is plainly not pleasant, defendant's term of incarceration was not increased at all, as occurred, for example, in *Miles*.

The concurring opinion in the present case expressed the view that *Harris* was wrongly decided, but did not discuss or cite *Miles*. That opinion said that this Court "signaled, albeit in obiter dictum, that the analysis set forth in *Harris* is deeply flawed"[97] in its opinion in *People v. Holder*.[98] If true that would be extraordinary, given that the *Holder* opinion does not mention *Harris* or *Miles* even in passing. The problem in *Holder* was that the trial judge, on receipt of a notice regarding the sentence from the Department of Corrections, "corrected" the sentence sua sponte and without notice when the sentence was *not* invalid, and so MCR 6.429(A) was not applicable. Holder had a previous conviction, and had been discharged from parole by the Department of Corrections. He committed several crimes within months of his parole discharge, and after he was sentenced on these, the Department of Corrections sent him a notice that his discharge from parole was "cancelled." The Department also sent a letter to the trial judge and the parties, informing them of the purported parole cancellation, and asking that defendant's sentence be amended to show that it was consecutive to the

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[96] Note that in the *Evans* case the correction was held appropriate, even though correction was not made until eleven years after sentence was imposed, and had result of extending hthe sentence by approximately four more years.

[97] *People v. Comer*, 312 Mich. App. 538, 2015 WL 5883900, at 3 (Gleicher, J., concurring).

[98] *People v. Holder*, 483 Mich. 168 (2009).

offense for which he was on parole, as required by statute. The trial judge did so sua sponte, and without notice to Holder.

The difficulty was that the Department had no authority, this Court held, to cancel defendant's parole discharge after it was granted. Defendant's original sentence then was not invalid, and because MCR 6.429(A) only allows the trial court to correct an invalid sentence, and prohibits the trial court from modifying a valid sentence after its imposition "except as provided by law," the trial court had exceeded its authority; indeed, it had transformed a valid sentence into an invalid one, for as a matter of law defendant was *not* still on parole, the cancellation of the parole discharge being of no effect.

This Court took the opportunity to reiterate that the sort of notice sent by the Department to the trial court was "merely informational, and any requests contained therein merely advisory." On receipt of such a notice, a judge must "determine whether the [alleged] error implicates a defendant's sentence, and consider the curative action recommended by the DOC." In so doing, trial courts "must comply with the relevant statutes and court rules," and if the claimed error is "substantive, the court may modify the sentence only '[a]fter giving the parties an opportunity to be heard' *and* if 'it has not yet entered judgment in the case....' MCR 6.435(B). Similarly, if the original judgment of sentence was valid when entered, MCR 6.429(A) controls and mandates that the court 'may not modify a valid sentence after it has been imposed except as provided by law.'"[99] Because Holder's sentence was *not invalid*, "the court had no authority to modify it in response to the DOC's letters. MCR 6.429(A)."[100]

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[99] *People v. Holder*, 483 Mich. at 176-177.

[100] *People v. Holder*, 483 Mich. at 177.

Again, *Holder* does not mention *Harris* or this Court's decision in *Miles* (and the concurring opinion here does not mention *Miles*). What if Holder had, in fact, been on parole, and yet the sentence had not been made consecutive to that offense? This situation is hardly different from that in *Miles*. There the law required that the sentence be five years for a second offense and the trial judge mistakenly sentenced the defendant to two years. This sentence was contrary to law, and did not constitute simply a "mistake"; the sentence as imposed was invalid, and this Court held it was correctable under MCR 6.429(A), virtually at any time (see discussion of *People v. Peck*, supra). Had Holder been on parole, his sentence would have been contrary to law, invalid, and thus correctable under MCR 6.429(A) and *Miles*.

The Court of Appeals considered this situation in a case arising after *Holder*, *People v. Howell*,[101] but addressed it under MCR 6.435 rather than MCR 6.429(A), which, amicus believes, is the more pertinent provision. The court held that the failure of the trial to address Howell's parole status in the original judgments of sentence was a mistake arising from an omission under MCR 6.435(A), because the trial court was required to specify that Howell's new sentences were to be served consecutively with the sentence from which he was on parole, but "entirely failed to do so."[102] Under 6.435(A) the trial court may correct "errors arising from oversight or omission[.]" An omission, said the court, is "'the act of omitting ... [or] something left out, not done, or neglected,'" and to "omit" is to "'to leave out; fail to include.'"[103] Because the trial judge had not specified whether the sentence was concurrent or consecutive (though without so indicating, the sentence

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[101] *People v. Howell*, 300 Mich. App. 638 (2013).

[102] *People v. Howell*, 300 Mich. App. at 646.

[103] *People v. Howell*, 300 Mich. App. at 646.

would run concurrently), this was "an omission—something that the trial court 'left out' or 'failed to include' in its original judgment of sentence."[104] It was thus correctable under MCR 6.435(A).

Under *Howell*, then, the requirement that defendant be subject to lifetime electronic monitoring at the conclusion of his incarceration—something *required* by statute (*if* required by statute)—"was something that the trial court 'left out' or 'failed to include' in its original judgment of sentence."[105] It was thus subject to correction under MCR 6.435(A). Nonetheless, amicus believes that MCR 6.429(A) is the more applicable court rule. MCR 6.435(A) concerns clerical mistakes, as well as errors arising from oversight and omission, which the court may correct at any time and on its own initiative. MCR 6.435(B) concerning substantive mistakes concerns the ability of a court to "reconsider and modify, correct, or rescind any order it concludes was erroneous, so long as the court has not yet entered judgment in the case"—and gives the parties an opportunity to be heard—and appears by its language to concern interlocutory orders made before the entry of the judgment, not an invalid judgment or sentence itself. An invalid sentence is the direct and specific concern not of MCR 6.435, but MCR 6.429(A), which should govern.[106] It permits a trial judge to

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[104] *People v. Howell*, 300 Mich. App. at 647.

[105] *People v. Howell*, 300 Mich. App. at 647.

[106] See further *People v Lamb*, 201 Mich. App. 178 (1993). Defendant pleaded guilty of one count of third-degree criminal sexual conduct and was illegally sentence to five years' probation, with the first year to be served in the jail. Over 2½ years later, the prosecutor filed a motion for resentencing, arguing that the probationary sentence was contrary to law. The Court of Appeals agreed that the sentence was invalid, but one day before that order the trial judge discharged the defendant from probation. On receipt of the Court of Appeals order, the trial court sentenced defendant to 6-15 years, and defendant claimed this was improper given his discharge from probation. The Court of Appeals disagreed that the discharge from probation precluded resentencing, saying that "we hold that the fact that the circuit court discharged defendant from probation did not preclude resentencing. The circuit court had the authority to correct the invalid sentence, MCR 6.429(A), and we affirm the sentence of six months to fifteen

correct an invalid sentence, and *Miles* permits that correction to occur at any time, and on the court's own motion, subject to possible considerations of due process with regard to notice and a hearing, and possibly with regard to timing (see *People v. Peck*).

Conclusion

The sentence here was invalid because it failed to include a required term, if indeed that term is required. The trial judge may correct it at any time, and here gave the defendant a hearing. Further, the timing of the correction raises no due process concerns. The trial judge has an obligation to sentence in accordance with the law, the determination of the appropriate punishment being a legislative matter. If the legislature has determined that lifetime electronic monitoring shall be a part of the punishment here, then the trial judge had an obligation to impose it, and, having failed to do so, to correct the invalid sentence.

Coda

MCR 6.429(A) provides that " The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." And MCR 6.508(D)(3)(b)(iv) defines "actual prejudice" required for an entitlement to relief under the motion for relief from judgment rules as " in the case of a challenge to the sentence, the sentence is invalid." What, then, is an "invalid" sentence? Amicus would be so bold as to suggest that the Court consider amending the rule to refer to an "illegal sentence." Guidance is provided by Judge Moylan, explaining the Maryland rule that "The court may correct an illegal sentence at any time."[107] As Judge Moylan puts it, "There are countless illegal sentences in the simple sense. They are sentences

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years in prison." *People v. Lamb*, 201 Mich. App. at 181.

[107] Maryland Rule 4-345(a).

that may readily be reversed, vacated, corrected or modified on direct appeal, or even on limited post-conviction review, for a wide variety of procedural glitches and missteps in the sentencing process. Challenges to such venial illegalities, however, are vulnerable to such common pleading infirmities as non-preservation and limitations. There is a point, after all, beyond which we decline to revisit modest infractions. There are, by contrast, illegal sentences in the pluperfect sense. Such illegal sentences are subject to open-ended collateral review. Although both phenomena may casually be referred to as illegal sentences, there is a critically dispositive difference between a procedurally illegal sentencing process and an inherently illegal sentence itself. It is only the latter that is grist for the mill of Maryland rule 4–345(a)."[108] The Maryland rule's "exemption from the normal procedural qualifiers is a narrow one, available only for a limited species of sentence illegalities"[109]; that is, the sentence must be "inherently illegal" in the sense that "it is a sentence that the court had never been statutorily authorized to impose."[110] This would include, then, situations such as the imposition of a concurrent sentence when a consecutive sentence is required, the imposition of a sentence term that is either longer or shorter than authorized by statute, the failure to include a sentence term required by statute, and, amicus believes, a sentence based on inaccurate information caused by a fraud on the court. "Ordinary" sentencing claims are, as Judge Moylan points out, in the Maryland system, subject to "the normal procedural qualifiers" concerning preservation and timely presentation for review.[111] Amicus would suggest this interpretation is apt

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[108] *Carlini v. State*, 81 A.3d 560, 563 (Md.App., 2013).

[109] *Carlini v. State*, 81 A.3d at 566.

[110] *Carlini v. State*, 81 A.3d at 567.

[111] *Carlini v. State*, 81 A.3d at 566.

for MCR 6.429(A), and that the Court perhaps consider an amendment to MCR 6.429(A) to refer to the ability of the trial court to correct an "illegal" sentence so understood at any time.

Relief

WHEREFORE, amicus supports affirmance of the convictions here.

Respectfully submitted,

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